
TOWN OF AGAWAM AND LOCAL 404, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, MCR-3511
(12/24/86). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

15. Supervisory and Managerial Employees
34.1 appropriate unit
34.2 community of interest
35.2 confidential
35.7 supervisory and managerial employees
92.51 appeals to full commission

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner

Appearances:

Ralph L. Atkins, Esq.	- Representing the Town of Agawam
David Rome, Esq.	- Representing Local 404, International Brotherhood of Teamsters

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

On July 25, 1985, Hearing Officer Sherrie R. Talmadge issued a decision in the above-entitled matter directing an election in a unit of all regular part-time and full-time Department Heads in the Town of Agawam (Employer), including:

Sealer of Weights and Measures, Director of the Council of Aging, Director of Parks and Recreation, Town Clerk, Town Assessor, Data Processing Manager, Director of Planning and Community Development, Veterans' Agent and District Director, Building Inspector, Health Agent, and Chief Librarian.¹

Local 404, International Brotherhood of Teamsters (Union) had also sought inclusion in the unit of the Fire Chief, Police Chief, Superintendent of Custodians, Superintendent of Public Works, Town Accountant, and Town Collector/Treasurer. The Hearing Officer excluded these positions as managerial within the meaning of G.L. c.150E, Section 1.

The Employer filed a timely appeal pursuant to Commission Rule 402 CMR

¹ The Chief Librarian was found to be a professional within the meaning of Section 1 of G.L. c.150E and hence would be allowed to vote on whether she wishes to be included in a unit of non-professionals. G.L. c.150E, Section 3.



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13.13(4).² The Employer moved that the Commission hear oral argument in support of its appeal, and that motion is hereby denied.³ Having reviewed the record and the supplementary statements of the parties, we affirm the Hearing Officer's decision for the reasons set forth below.

Facts

The Commission's Rules state that a hearing officer's findings of fact will constitute the record on review unless one of the parties in its supplementary statement directs the Commission to specific evidence warranting either a contrary finding on a material issue or an additional material finding not made by the hearing officer. 402 CMR 13.13(5). Hadley School Committee, 7 MLC 1632, 1634 (1980).

In the instant case, the Employer points to no particular factual error or omission and states that the essence of its appeal is the interpretation of certain language in G.L. c.150E (the Law).⁴ Since neither party specifically challenged any of the hearing officer's findings of fact, those findings are hereby adopted for the purpose of our review. Town of Dedham, 3 MLC 1332 (1976); City of Medford, 3 MLC 1584 (1977). We summarize the Hearing Officer's general findings of fact below.

The Town of Agawam is run by a 15-member Town Council, which is the legislative branch of Town government. The Town Council appoints a Town Manager as the chief executive officer.

The Town Manager is responsible to the Town Council for the administration of all Town affairs under the charter. With the exception of the Town Accountant,

²The parties requested copies of the tape recorded proceedings before the Hearing Officer, portions of which were inaudible. The parties failed to agree upon a reconstruction of those portions of the tapes. However, neither party argued on appeal that the factual findings of the Hearing Officer were in error. See discussion infra.

³Commission Rule, 402 CMR 13.13, governing the appeal of hearing officer decisions, does not provide for oral argument on an appeal of a hearing officer's decision. Rule 402 CMR 14.09(2) states that the record before the Commission on review of a hearing officer decision in a representation hearing is the same as set forth in 402 CMR 13.13(6). While the Rules do not preclude oral argument before the Commission, the Employer has not persuaded us that its position was not adequately expressed in its supplemental statement or that oral argument is necessary in this case.

⁴The Employer does point to certain testimony by the Town Manager concerning time spent by the Town Clerk when acting as Acting Town Manager. However, the facts referenced by the Employer are included in the Hearing Officer's factual determinations in footnote 5 of the Hearing Officer's opinion.



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the Town Manager supervises and directs the administration of sixteen of the Town's departments, each of which has a Department Head. The Town Manager has the ultimate authority to appoint and remove, subject to applicable Civil Service laws, all officers and employees of the Town, except employees of the school department. The Town Manager also fixes the compensation of all Town officers and employees appointed by her. The Town Manager compiles a proposed Town budget for each fiscal year and submits it to the Town Council with recommendations for funding. The Town Council can adopt or reduce the budget, but, except on recommendation of the Town Manager, cannot increase any amount in the proposed budget.

All Department Heads share similar responsibilities. They prepare department budgets in accordance with procedures specified by the Town Manager. The Town Manager meets with all Department Heads several times a year to distribute information about the budget and, on occasion, requests that the proposed departmental budgets remain level-funded.

All Department Heads have one or more members of a bargaining unit represented by AFSCME reporting to them. Some departments also contain employees who are members of other bargaining units. The Department Heads administer the collective bargaining agreements of the unionized employees within their departments. The Department Heads participate in the grievance procedures of the various applicable collective bargaining agreements at the step just before a grievance is submitted to the Town Manager.

All Department Heads are involved in hiring employees within their departments. They review the applications of prospective employees and refer the name of their recommended candidate to the Town Manager. Although the Town Manager has the final hiring authority, in practice no applicant is hired without the Department Head's recommendation. The Department Heads also recommend disciplinary action up to and including termination, to the Town Manager, who usually follows their recommendations. The Department Heads control and direct the work of their employees and review and evaluate employees' work performance twice a year. When appropriate, the Department Heads recommend merit salary increases to the Town Manager, who approves the recommendations and executes the form for the wage increase. The current Town Manager has never disagreed with a Department Head's merit recommendation. The Department Heads do not collectively formulate policy on Town-wide matters.

Pursuant to the Town Charter, an acting Town Manager is designated between four and six times a year by the Town Manager to serve during her temporary absence and at her discretion. Employees who are designated Acting Town Manager carry out their own work and stay in their regular office. As acting Town Manager, they primarily perform ministerial duties, such as signing the payroll warrants permitting Town employees to be paid.

The hearing officer also made specific findings of fact regarding each position in the union's petition.⁵

⁵For the sake of brevity, these findings are not reiterated here; they can be found at Town of Agawam, 12 MLC 1103 (H.O. 1985).



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Opinion

On appeal, the Employer contends that the definition of "employee" in Section 1 of the Law demands the exclusion of "heads" of municipal departments. The Employer argues that the legislative history and proper interpretation of M.G.L. c.150E led to the conclusion that Section 1 of the Law defines employee to exclude any municipal employee who holds the title "department head" regardless of whether the employee is managerial or confidential. Thus, the Employer concludes, it is not necessary to determine whether the employee meets the statutory definition of managerial or confidential. The Employer reaches this conclusion through an analysis of the legislative history and its interpretation of certain language contained in Sections 1 and 3 of the Law.

In the alternative, the Employer argues that each position in the petitioned-for unit is, in fact, managerial and/or confidential.

G.L. c.150E, Section 1, states in pertinent part that:

"Employee" or "public employee," any person in the executive or judicial branch of a government unit employed by a public employer except elected officials, appointed officials, members of any board or commission, representatives of any public employer [including the heads, directors and executive and administrative officers of departments and agencies of any public employer,] and other managerial employees or confidential employees, and members of the militia or national guard and employees of the commission, and officers and employees within the departments of the state secretary, state treasurer, state auditor and attorney general. [emphasis added]

The Commission has previously considered the argument that employees titled "department heads" are excluded from the coverage of the Law by Section 1 merely because of their titles. In Waltham School Committee, 3 MLC 1242 (1976), the Employer argued that Department Heads and other school administrators were "representatives" of the Employer within the meaning of Section 1, and thus were excluded from the statutory definition of employee. The Commission noted that by the use of the word "other" in conjunction with "managerial employees" in Section 1, the statute defines "representatives" of the public employer to be coextensive with the term "managerial employee." By specifying that "...the heads...of departments...of any public employer, and other managerial employees..." shall be exempt from collective bargaining, the plain language of the statute requires that the "heads...of departments" be considered one sub-group of "managerial employees." Thus not only "heads...of departments" but also "other managerial employees" [emphasis added] are to be excluded. If the head of the department is not a "managerial employee" however, the statute does not require his or her exclusion from coverage of the Law. The Law defines "managerial employee" according to the responsibilities exercised by the employee. The legislature took care to establish that an employee's "managerial" status would be determined by the responsibility and authority exercised. The Employer's argument is premised on the assumption that at the same time the Legislature intended that any employee who was titled the "head" of a department would,



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without further inquiry, be excluded from the Law's coverage. We cannot endorse such an interpretation of the statute. The reading of the statute urged by the Employer would encourage employers simply to label employees as "department heads" in order to exclude them from the coverage of the Law. Since there is no single factor common to department heads as a group which would warrant their exclusion from the Law, each individual position must be considered on the basis of an examination of actual job duties, rather than merely titles. Therefore we will continue to follow Commission precedent by scrutinizing the duties and responsibilities of the employees to determine whether they are managerial or confidential. Town of Milton, 8 MLC 1234 (1981) (library assistant director functioned as department head but shared same responsibilities as other unit employees and therefore was included in the unit). Town of Dartmouth, 1 MLC 1257 (1975) (employees "appointed" to their public jobs were not excluded as "appointed officials," instead Commission examined whether employees were "managerial"). See also Town of Burlington, 4 MLC 1823 (H.O. 1978).

The employer further argues, in the alternative, that all the petitioned-for positions are managerial and/or confidential. Section 1 of the Law defines managerial and confidential employees as those who

(a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration. Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter. (emphasis added).

The Commission has held that the scope of discretion exercised by a managerial employee in formulating policy must be significant when considered in relation to the mission of the public enterprise, Wellesley, 1 MLC 1389 (1975), or, the employee's decisions must impact a significant part of the public enterprise, Winchester School Committee, 3 MLC 1653 (1977). However, the term "participate to a substantial degree in formulating policy" includes not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the process which results in a decision to put a policy into effect. Thus, it would not include one who provides some input necessary for the development of policy, but does not otherwise participate meaningfully in the decision making process itself. Worcester, supra; Town of Wellfleet, 11 MLC 1238 (1984). See also, City of Binghamton, 12 PERB 3099 (1979).

Employees who assist to a substantial degree in the preparation for or conduct of collective bargaining on behalf of the employer are considered managerial. But their assistance must take the form of direct involvement in the preparation and formulation of the employer's proposals or positions in collective bargaining. Mere



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consultation by the employer with a supervisory employee concerning the implications or feasibility of proposals would not be deemed managerial, unless the employee either participated in the actual conduct of negotiations, or enjoyed direct involvement in making collective bargaining decisions. Wellesley School Committee, 1 MLC 1407 (1975), Town of Holbrook, 1 MLC 1468 (1975), Cambridge School Committee, 2 MLC 1381 (1976), Waltham School Committee, 3 MLC 1242 (1976). Also see State of New York, 5 PERB 2001 (1972).

The final statutory requirement for a managerial employee is that he/she has substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement. Many supervisory employees have a responsibility to insure that the terms and conditions of a collective bargaining agreement are complied with, but this responsibility does not usually require independent judgment. Where, however, the implementation of an agreement necessitates a change in the employer's procedures, for example, the person authorized to independently approve such a change would have managerial responsibility.

In Wellesley, supra, the Commission held that there must be more than a coincidence of recommendation and acceptance by a higher authority for judgment to be considered independent. It must lie within the employee's discretion, without consultation. Further, the judgment exercised must be significant. Thus, perfunctory denials, and routine or automatic decisions are not considered "substantial responsibility" in administering a collective bargaining agreement.

Since the Commission determines the status of an employee based on job functions and responsibility rather than on the basis of job titles, a determination of the managerial status of the employees in the instant case must be based on the facts adduced from the record as a whole, using the standards enunciated above.

Having reviewed the Hearing Officer's decision in light of the record as a whole and the applicable legal principles, we conclude that the record supports the Hearing Officer's findings regarding managerial exclusions, and we perceive no error in the Hearing Officer's conclusions based on the applicable law.

The Fire Chief, Police Chief, Superintendent of Public Works, Superintendent of Custodians, Town Collector/Treasurer and Town Accountant were correctly excluded as managerial based on their policy making role and/or participation in collective bargaining.

The record further supports the Hearing Officer's finding that the remaining positions are purely administrative or supervisory.⁶ They merely implement policy,

⁶ The Employer points to a Department Head's general authority to incur liability on behalf of the Town as an important factual consideration. However, c.44 Section 31 states that departments cannot incur liability in excess of that department's appropriations. This statutory provision limits a Department Head to spend only those funds in the budget (which in turn are subject to review and change by

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enforce laws, ordinances and regulations and may have police powers. None of the remaining employees participate in the collective bargaining process. While they all supervise employees, they only serve as the first step in the grievance procedure.

The employer contends, in particular, that the Town Clerk should be excluded since he/she has frequently served as Temporary Town Manager in the past and is designated as the replacement for Clerk of Council, a confidential position. There is nothing in the record to indicate that the Clerk assumed anything but ministerial duties while serving as Acting Town Manager. Furthermore, the Clerk served in that capacity several years ago, and the Town Manager testified that should the need arise, she would not select the Town Clerk to serve as Temporary Town Manager again. There is also insufficient evidence to indicate how often, if at all, the Town Clerk has actually served as Clerk of Council. To be classified as confidential, an employee must have a continuing and substantial relationship with a managerial employee involving a legitimate expectation of confidentiality in their routine and recurrent dealings. Town of Wellfleet, 11 MLC 1438 (1984); Town of Scituate, 7 MLC 2120 (1980). This requirement is not met here.

The Employer makes further reference to the Health Agent and Building Inspector and argues that the independence, discretion and authority exercised in performance of their duties is substantial enough to exclude them as managerial.

The record indicates that these highly technical positions have independent responsibility for enforcement of the various laws and codes. While their enforcement powers may very well affect the citizens or buildings of Agawam, they have no more managerial responsibility than a police officer, who is often called upon to exercise substantial independent judgment and discretion in enforcing the law. Similarly, the independent judgment of a firefighter can also affect the citizens and buildings of Agawam. Neither police officers or firefighters are thereby considered managerial. Indeed, in Town of Wellfleet, 11 MLC 1238 (1984), the Commission, citing Town of Dedham, 4 MLC 1347 (1977), held that certain "inspectors" were not managerial because they do not formulate or determine policy, but rather apply fixed standards on a routine basis in accordance with the laws they enforce. Similarly, we agree with the Hearing Officer's conclusion that neither the Health Agent nor the Building Inspector are managerial employees.

Therefore, based on the record as a whole, we find the remaining employees, including the Town Clerk, Building and Health Inspector, do not meet the requirements for the managerial or confidential exclusion.

Accordingly, we affirm the Hearing Officer's decision in this matter.

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the Town Manager and Council before approval). Thus, they only have authority to spend what has been approved by a higher level of supervision. City of Marlborough v. Cybielski, 370 Mass. 157 (1976).



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Direction of Election

On the basis of the foregoing, we conclude that a question has arisen concerning the representation of certain employees in the Town of Agawam. The following unit is appropriate for collective bargaining:

All regular part-time and full-time Department Heads in the Town of Agawam, including employees in the following positions:

Sealer of Weights and Measures, Director of the Council of Aging, Director of Parks and Recreation, Town Clerk, Town Assessor, Data Processing Manager, Director of Planning and Community Development, Veterans Agent and District Director, Building Inspector, Health Agent, and Chief Librarian, but excluding the Fire Chief, Police Chief, Superintendent of Custodians, Superintendent of Public Works, Town Accountant and Town Collector/Treasurer and all other managerial or confidential employees.

IT IS HEREBY DIRECTED that an election shall be held for the purpose of determining whether a majority of the employees in the above-described units desire to be represented by Local 404, International Brotherhood of Teamsters.

Inasmuch as the above-described unit includes the position of Librarian, found to be professional within the meaning of Section 1 and 3 of the Law, employees who hold that position shall be given a separate ballot which will offer them the choice of placement within the above-described unit or representation by Local 404, International Brotherhood of Teamsters, in a separate unit.

The eligible voters shall include all those persons within the above-described unit whose names appear on the payroll of the Employer on December 24, 1986, and who have not since quit or been discharged for cause.

In order to ensure that all eligible voters shall have the opportunity to be informed of the issues and their statutory right to vote, all parties to this election shall have access to a list of voters and their addresses which may be used to communicate with them.

Accordingly, IT IS HEREBY FURTHER DIRECTED that three (3) copies of an election eligibility list containing the names and addresses of all eligible voters must be filed by the Employer with the Executive Secretary of the Commission, Leverett Saltonstall Building, 100 Cambridge Street, Room 1604, Boston, Massachusetts 02202, not later than fourteen (14) days from the date of this decision.

The Executive Secretary shall make the list available to all the parties to the election. Failure to make timely submission of this list may result in substantial prejudice to the rights of the employees and the parties; thus, no extension of time for the filing thereof will be granted except under extraordinary circumstances. Failure to comply with this direction may be grounds for setting aside the election should proper and timely objections be filed. SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS, LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN

MARIA C. WALSH, COMMISSIONER

